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THE TRIUMPH OF GILMORE'S *THE DEATH OF CONTRACT*

Robert A. Hillman*

Measured by its notoriety, Grant Gilmore's *The Death of Contract* has been a huge success.¹ The book caught the legal community's fancy almost immediately,² and the romance has continued for over twenty years. *The Death of Contract* has been the subject of a myriad of book reviews and law review articles,³ and it enjoys a prominent place in most contracts casebooks.⁴ The collection of essays in this volume demonstrates the continuing interest in Gilmore's account.

The book's popularity is curious because it was not a critical success.⁵ Reviewers found much of Gilmore's account inaccurate, incomplete, exaggerated, or unoriginal.⁶ Despite the accuracy of many of these criticisms, and with the benefit of twenty years of hindsight, I

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¹ GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995). See, e.g., Anthony J. Waters, *For Grant Gilmore*, 42 MD. L. REV. 865, 870 (1983) [hereinafter Waters, *Grant Gilmore*] ("[T]he idea that 'Contract is Dead' has been firmly established in the collective legal mind.").

² See, e.g., the discussion and collection of sources in Richard Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125, 1125 (1977).

³ *Id.* at 1125 n.2.

⁴ See, e.g., CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW* 101 (3d ed. 1993); ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* 133 (2d ed. 1992).

⁵ See, e.g., James R. Gordley, Book Review, 89 HARV. L. REV. 452 (1975); Robert W. Gordon, Book Review, 1974 WIS. L. REV. 1216; Morton J. Horwitz, Book Review, 42 U. CHI. L. REV. 787 (1975); Ralph J. Mooney, *The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore*, 55 OR. L. REV. 155 (1976); Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975); see also Danzig, *supra* note 2, at 1133 (*The Death of Contract* "is a gloriously written, richly embellished, rather imaginative teacher's manual."); Waters, *Grant Gilmore*, *supra* note 1, at 865 ("Historians condemned [*The Death of Contract*] as bad history; scholars fell over each other to proclaim it poor scholarship . . .").

⁶ See sources collected *supra* note 5. Robert Gordon's perceptive review captured many of the complaints. Gordon, *supra* note 5, at 1216, 1224-25 n.38, 1231 (Gilmore only "hints" at answers; Gilmore "completely misunder[stood] the Friedman-Macauley thesis;" Gilmore's perspective was a "common one among scholars of contract law").

will argue that the triumph of *The Death of Contract* should be no surprise. Notwithstanding its deficiencies, the book contributes important insights into the process of legal change. Moreover, the book is an aesthetic delight. Let me explain.

I. GILMORE'S ACCOUNT OF THE BIRTH AND DEATH OF CONTRACT

In a nutshell, Gilmore posited that nonconsensual tort law in this century gradually absorbed the nineteenth-century contract-law construct.⁷ Gilmore was influenced by the legal realists, who, although varying in their degree of skepticism,⁸ generally posited a lack of objectivity and determinacy in our legal system. The realists believed that courts based their decisions not on abstract legal rules, but on the pragmatic evaluation of the context.⁹ Gilmore asserted that the "death of contract" was inevitable: Contract law was an artificial "ivory tower abstraction"¹⁰ improvised by Langdell in his famous casebook, nurtured by Holmes in *The Common Law*, and restated by Williston to reflect late nineteenth- and early twentieth-century society's dalliance with free-market economics and individualism.¹¹

A. *The Birth of Contract*

According to Gilmore, Langdell "launch[ed] the idea that there was . . . a general theory of contract"¹² in his 1871 casebook, which, for the first time, collected "all the important contract cases."¹³ The casebook approach reflected the notion that a set of legal rules could be applied mechanically and scientifically to deduce decisions from the facts.

The bargain theory of consideration, the heart of the general theory (or as Gilmore better put it, "the balance-wheel of the great machine"),¹⁴ reflected Holmes's individualist view that legal liability to others discourages socially useful activity and that promissory lia-

⁷ GILMORE, *supra* note 1, at 95, 103.

⁸ James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 9.

⁹ Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223, 226-28.

¹⁰ GILMORE, *supra* note 1, at 19.

¹¹ *Id.* at 6-9, 52, 104-05, 107. See generally Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 113-14 (1988) (Gilmore reported that the bargain theory was an "artificial and narrow construct" that reflected society's free-market orientation.).

¹² GILMORE, *supra* note 1, at 15.

¹³ *Id.* at 14. The casebook is C. LANGDELL, *CASES ON THE LAW OF CONTRACTS* (1st ed. 1871).

¹⁴ GILMORE, *supra* note 1, at 19.

bility therefore should be as narrow as possible.¹⁵ Prior to Holmes's formulation, consideration consisted of a benefit to the promisor or a detriment to the promisee, but the benefit or detriment did not have to induce the promise.¹⁶ Holmes's approach reduced liability by including the latter requirement: Consideration demanded "reciprocal conventional inducement . . . between consideration and promise,"¹⁷ an idea later adopted by both contract Restatements.¹⁸ In this guise, the bargain theory could explain several rules narrowing contractual liability, such as the revocability of offers and the unenforceability of contract modifications, agreements to agree, and arrangements lacking mutuality of obligation.¹⁹ This framework reflected and supported the dominance of free-market values in the late nineteenth century.²⁰

Gilmore also claimed that within the limited boundaries of the bargain theory as conceived by Holmes, liability was to be absolute.²¹ Although seemingly contradictory (why confine liability on the one hand and limit grounds for avoiding it on the other?), Gilmore surmised that both thrusts narrowed the scope of fact issues, thereby reducing the costs and uncertainties of litigation.²² As to absolute liability, if a party made a bargained-for promise, the party had to perform the promise or pay damages. Courts would not entertain excuses.²³ This approach would reduce the need for meddlesome judicial intervention, such as factual inquiries into the parties' motives.²⁴ Gilmore also characterized the shift from subjective to objective interpretation of contracts as an example of the move to absolute liability. Interpreting contracts objectively narrowed the potential grounds of avoiding liability for a bargained-for exchange by eliminating the excuse that a promisor was subjectively mistaken about contract terms,

¹⁵ Gilmore cited Holmes's *The Common Law*, in which Holmes asserted that "[t]he general principle of our law is that loss from accident must lie where it falls . . ." GILMORE, *supra* note 1, at 17-18.

¹⁶ Prior to Holmes, "[a] valuable consideration [was] one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made." GILMORE, *supra* note 1, at 121 n.34 (quoting 2 KENT, COMMENTARIES ON AMERICAN LAW 465 (4th ed. 1840)).

¹⁷ *Id.* at 22 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 227-30 (Howe ed. 1963) (1881)).

¹⁸ See RESTATEMENT OF CONTRACTS § 75 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981).

¹⁹ GILMORE, *supra* note 1, at 23-24, 36.

²⁰ *Id.* at 104-05.

²¹ *Id.* at 15.

²² *Id.* at 52-54.

²³ *Id.*

²⁴ *Id.* at 46-47.

was otherwise careless about the use of language, or had a good reason for not performing.²⁵

It was left to Williston to collect the cases that supported the new contract theory, to reject those that contradicted it, and to restate the cases in "meticulous, although not always accurate, scholarly detail" in the *Restatement of Contracts*.²⁶ But the theory was already crumbling, and the end-product of Williston's efforts could not avoid reflecting the forces of change.²⁷

B. *The Death of Contract*

Not surprisingly, Gilmore attributed the demise of the Holmes-Williston construct to its shaky origins. According to Gilmore, the theory began to disintegrate when it no longer served commercial and social interests in the twentieth-century welfare state.²⁸ Legal reaction was swift. The "tide of codification" in projects such as the Uniform Commercial Code centered analysis on legislative policy adverse to contract theory's paradigm of limited liability.²⁹ Analysts found inconsistencies in and alternative explanations for the cases supposedly supporting the theory.³⁰ Judges refused to follow the theory in difficult cases, creating an "explosion of liability"³¹ and requiring the recognition of additional theories of obligation in the Restatements and case law.³² At the same time, courts also increasingly entertained claims of excuse once a bargain was found.³³ Let us take a more focused, albeit brief, look at a few of these changes.

1. *The expansion of theories of obligation.*—Gilmore reported that theories of obligation based on detrimental reliance or unjust en-

²⁵ *Id.* at 48-49; see also *id.* at 53 ("To the extent that a theory of excuse from a contractual obligation is admitted, it becomes necessary to take particular factual situations into account."). Gilmore disapproved of contract law's move from subjective to objective interpretation of contracts, from "extended factual inquiry into what was 'intended,' 'meant,' [and] 'believed,' " to an abstract focus on "precedents about recurring types of permissible and impermissible 'conduct.'" *Id.* at 46-47.

²⁶ *Id.* at 15, 23-24.

²⁷ See *infra* notes 28-46 and accompanying text.

²⁸ GILMORE, *supra* note 1, at 103-05; see, e.g., Kurt A. Strasser, *Contract's "Many Futures" After Death; Unanswered Questions of Scope and Purpose*, 32 S.C. L. REV. 501, 509 (1981).

²⁹ For example, the Uniform Commercial Code enforced promises modifying existing contracts. GILMORE, *supra* note 1, at 76, 85.

³⁰ *Id.* at 63-64, 70-71. For example, analysts found liability in cases lacking "conventional reciprocal inducement." *Id.* at 70.

³¹ *Id.* at 63-64, 68-69, 71-72. For example, Gilmore pointed to the explosion of products liability cases under the RESTATEMENT (SECOND) OF TORTS. *Id.* at 103; see Speidel, *supra* note 5, at 1165.

³² See *infra* notes 34-44 and accompanying text.

³³ See *infra* notes 45-46 and accompanying text.

richment dominate contract law.³⁴ For example, Gilmore pointed out the “paradox” between Section 75 of the first *Restatement of Contracts*, which incorporated the Holmesian bargained-for exchange consideration requirement,³⁵ and the promissory estoppel theory of Section 90. The latter section enforces promises that have induced reasonable reliance even when the promise is not supported by consideration. Section 90 came to be known as the doctrine of promissory estoppel.³⁶

Gilmore perceived not only that promissory estoppel filled a gap in promise enforcement,³⁷ but that it had usurped the bargain theory’s dominant role in that process. Gilmore claimed that the expansion of Section 90 in the *Restatement (Second) of Contracts*, as evidenced primarily by its “elaborate [c]ommentary,” demonstrated the triumph of promissory estoppel.³⁸ As particular proof, he pointed to the following comment to Section 90 in the Second Restatement:

Certainly . . . reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange. . . . This Section thus states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains.³⁹

Gilmore therefore concluded that,

[t]he wholly executory exchange where neither party has yet taken any action would seem to be the only situation in which it would be necessary to look at [Section] 75—and even there, as the Comment somewhat mysteriously suggests, the ‘probability of reliance’ may be a sufficient reason for enforcement without inquiring into whether or not there was any ‘consideration.’⁴⁰

³⁴ GILMORE, *supra* note 1, at 77-81, 85-93.

³⁵ RESTATEMENT OF CONTRACTS § 75 (1932) provided in part:

- (1) Consideration for promise is
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) The creation, modification or destruction of a legal relation, or
 - (d) a return promise, bargained for and given in exchange for the promise. . . .

³⁶ RESTATEMENT OF CONTRACTS § 90 (1932) provided in part:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

³⁷ GILMORE, *supra* note 1, at 77-78.

³⁸ *Id.* at 79. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

³⁹ GILMORE, *supra* note 1, at 79 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (Tentative Draft No. 2, 1965)).

⁴⁰ *Id.* at 79-80. Students of contract law probably recognize that Lon Fuller’s seminal work on the reliance interest inspired the Comment’s “mysterious” reference to the “probability of reliance” supporting the enforceability of executory exchanges. Lon L. Fuller & William R.

Just as reliance usurped the role of consideration when a promisee suffers a detriment, the theory of restitution or quasi-contract, according to Gilmore, diminished the importance of consideration when a promisor receives a benefit.⁴¹ Under quasi-contract, a party can recover the value of a benefit conferred on another when the party did not intend to make a gift and did not foist the benefit. The benefit does not have to be part of a bargain.⁴² Gilmore pointed out that Section 86 of the Second Restatement, governing promises for benefit received, was schizophrenic in its tendency both to broaden and to confine unjust enrichment theory. Nevertheless, he predicted that by affording "overt recognition" to the theory,⁴³ Section 86 ultimately would precipitate the expansion of unjust enrichment, just as Section 90 laid the foundation for detrimental reliance.⁴⁴

2. *The rise of excuse law.*—According to Gilmore, the growing willingness of twentieth-century courts to excuse failure to perform on the basis of unforeseen circumstances or a mistake of fact signaled the demise of Holmes's second tenet of the bargain theory, the promisor's absolute liability within a bargain.⁴⁵ Courts were now free to consider excusing a promisor because of a mistake or because performance was impractical or frustrated.⁴⁶ Such activity would tempt courts to apply

Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936). Fuller maintained that reliance on a promise presented a stronger reason for enforcing promises than a mere expectation. He reasoned that reliance entails a change of position to the promisee's detriment, which often also unjustly benefits the other party. "[T]he restitution interest is merely a special case of the reliance interest" *Id.* at 55. A mere unfulfilled expectation, on the other hand, leads only to disappointment. *Id.* at 56. Nevertheless, Fuller believed that reliance may be difficult for a party to prove and to quantify. If contract law required proof of reliance, business people might hesitate to rely on their agreements. Courts must therefore enforce agreements without proof of reliance (but with the likelihood that it occurred) in order to encourage it. "To encourage reliance we must . . . dispense with its proof." *Id.* at 62. Fuller's reasoning thus suggested that the primary justification for enforcing purely executory exchanges is reliance, not bargain or promise.

⁴¹ GILMORE, *supra* note 1, at 81.

⁴² E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 2.20 (1990).

⁴³ GILMORE, *supra* note 1, at 84.

⁴⁴ *Id.* at 84. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) enforces promises for benefit received:

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

(2) A promise is not binding under Subsection (1) (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched or (b) to the extent that its value is disproportionate to the benefit.

Other examples of the expansion of liability beyond the Holmes-Williston construct include the enforcement of contract modifications without fresh consideration, the enforcement of bare offers, and the "exploded" theory of mutuality of obligation. GILMORE, *supra* note 1, at 85.

⁴⁵ *Id.* at 85-92.

⁴⁶ *Id.*

principles far removed from the parties' bargain, such as the fairness of compelling performance under the circumstances.

II. WHAT IS WRONG WITH THIS STORY?

Critics have pointed out in detail the historical inaccuracies in Gilmore's account of the rise of the general theory of contract.⁴⁷ I will not repeat them here. Suffice it to say that Gilmore's portrayal is highly suspect because it ignores almost three centuries of economic and legal history.⁴⁸ According to Professor Speidel, for example, contract theory did not spring from the heads of Langdell and Holmes, but evolved as "a very natural adaptation of prevailing economic attitudes to serve important legal needs."⁴⁹ Professor Gordley observed that a theory of contract has existed in England since the twelfth century.⁵⁰

Gilmore's depiction of the death of contract was also exaggerated. No doubt alternative theories of obligation rose in prominence, both to supply rationales for promise enforcement when bargain gave out and to offer additional justifications for enforcement when the parties made a bargain. Alternative theories supported the reality that increasing numbers of contracts are merely components of complex, continuing relations that give rise to significant restitution and reliance interests.⁵¹ To appraise these interests, courts must focus on the social conditions supporting a relation and the fairness of creating, or declining to create, an obligation in particular contexts, not solely on whether parties had formally agreed to a bargain.⁵² In addition, twentieth-century contract law has witnessed the expansion of avenues of liability avoidance on the basis of excuses such as impossibility, frustration, and impracticability.⁵³

⁴⁷ See sources cited *supra* note 5.

⁴⁸ See Speidel, *supra* note 5, at 1162, 1167-68 (describing Gilmore's view of bargain theory as being "rooted in [neither] case law [nor] the real world").

⁴⁹ *Id.* at 1170. As a result, "the . . . bargain theory was more evolutionary than revolutionary." *Id.* at 1171.

⁵⁰ Gordley, *supra* note 5, at 453.

⁵¹ See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1301-02 (1990).

⁵² Contracting parties' minds do not "meet" at one time concerning important terms of agreements. Instead, contract formation is "an incremental process" with the parties "agree[ing] to more and more as they proceed." Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018, 1041 (1981).

"The trouble was that businessmen, adapting to changing circumstance, kept doing things differently. The 'general theory' required that, always and everywhere, things remain as they had, in theory, always been." GILMORE, *supra* note 1, at 37.

⁵³ Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 651 (1983) [hereinafter Hillman, *Cessation*].

Despite the importance of alternative theories of obligation and grounds of excuse, however, Gilmore craftily overstated his message to focus attention.⁵⁴ In fact, contract theory's continued importance should not be too surprising. Although free-market forces declined as legislative-administrative processes responsive to the "perceived costs or excesses" of the market came to dominate the twentieth-century welfare state,⁵⁵ those forces never were completely submerged. In the limited domain that antitrust, labor, consumer protection, and many other regulatory laws ceded to private bargainers, courts continued in some measure to administer the principle of freedom of contract.⁵⁶ Moreover, individualism has resurfaced, energized by a general disillusionment with unsuccessful social policies and by the wave of deregulation implemented by President Reagan in the 1980s.⁵⁷ This new environment has resuscitated contract theory.⁵⁸

Recent case law trends bear out the latter observation. Although many courts allow promissory estoppel recoveries,⁵⁹ thereby increasing the potential liability of parties at the bargaining stage, many other courts resist the theory. In fact, between 1981 and 1992, New York courts addressed promissory estoppel in thirty-four cases and rejected the theory in twenty-nine of them.⁶⁰ During the same period, California rejected promissory estoppel in ten out of thirteen cases.⁶¹ Courts decline to apply promissory estoppel for a variety of reasons: lack of a clear and unambiguous promise,⁶² unreasonableness of the reliance,⁶³

⁵⁴ Gilmore alludes to the possible resurrection of contract in the future. GILMORE, *supra* note 1, at 112. See *infra* notes 77-79 and accompanying text.

⁵⁵ Speidel, *supra* note 5, at 1175; see also P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 716-18 (1979). The rise of the welfare state in America began with factory laws and worker's compensation laws designed to "safeguard the individual against the uncertain nature" of industrialized society. BERNARD SCHWARTZ, *THE LAW IN AMERICA* 163-64 (1974); see also KARL POLANYI, *THE GREAT TRANSFORMATION* 149-50 (1944) (countermove against economic liberalism and laissez-faire was a "spontaneous reaction" to protect against destruction of the social order).

⁵⁶ Speidel, *supra* note 5, at 1175.

⁵⁷ Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 627 (1987).

⁵⁸ Speidel, *supra* note 5, at 1171; Strasser, *supra* note 28, at 510.

⁵⁹ E.g., *Hoffman v. Red Owl Stores Inc.*, 133 N.W.2d 267 (Wis. 1965). On reliance theory generally, see, e.g., Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985); Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983).

⁶⁰ See Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1272-73 (1994). The cases are taken from my own LEXIS survey. See *id.* at 1272 n.63.

⁶¹ *Id.* at 1272-73.

⁶² See *Pacific Architects Collaborative v. State*, 166 Cal. Rptr. 184, 191 (Cal. Ct. App. 1979) (ruling that state made no implied promise to award construction contract to lowest bidder); *Division of Labor Law Enforcement v. Transpacific Transp. Co.*, 137 Cal. Rptr. 855, 861 (Cal. Ct. App. 1977) (ruling that employer neither expressly nor impliedly promised to pay employee bonuses); *Messina v. Biderman*, 571 N.Y.S.2d 499, 500 (N.Y. App. Div. 1991) (finding that city

or absence of injury to the promisee.⁶⁴ A court may even excuse the promisor because her conduct was not "unconscionable," such as when a subcontractor honestly, but mistakenly, submits an incorrect price quotation.⁶⁵ This survey of cases may show only that litigants in New York and California bring weak promissory estoppel cases. On the other hand, it is at least some evidence that courts do not greet the theory with open arms.⁶⁶ In fact, Gilmore called such cases "underground cases," a body of cases that have not yet emerged in the law reviews and treatises to show the actual state of the law.⁶⁷

Moreover, the bargain theory retains importance because it affords parties grounds for avoiding liability.⁶⁸ A party can expressly reserve her right not to contract, making unreasonable any reliance by the other party on statements made during negotiations. In addition, although the subject is somewhat controversial, a promisee may have a greater chance of recovering expectancy damages under the bargain theory. Under promissory estoppel, a court might limit recovery to reliance costs.⁶⁹

Courts also excuse performance in far from limited circumstances. Successful cases involve losses to the promisor manifestly dis-

did not promise to sell property, only to negotiate for sale), *appeal denied*, 580 N.E.2d 1057 (N.Y. 1991); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 452 N.Y.S.2d 590, 593 (N.Y. App. Div. 1982) (finding that lessor did not promise to renew lease, only to negotiate for more definite terms), *aff'd*, 444 N.E.2d 35 (N.Y. 1982).

⁶³ See *Peterson Dev. Co. v. Torrey Pines Bank*, 284 Cal. Rptr. 367, 374 (Cal. Ct. App. 1991) (finding no reasonable reliance where letter of commitment to loan money lacks material terms); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 571 N.Y.S.2d 237, 238 (N.Y. App. Div. 1991) (finding no reasonable reliance where alleged distributorship promise was not only indefinite, but also contrary to other evidence); *Nicit v. Nicit*, 555 N.Y.S.2d 474, 476 (N.Y. App. Div. 1990) (finding that husband "was not justified in relying on his own erroneous interpretation" of wife's representations regarding the sale of marital property).

⁶⁴ For example, in *Hoover Community Hotel Corp. v. Thompson*, 213 Cal. Rptr. 750, 759 (Cal. Ct. App. 1985), the court refused to enforce a church's promise to sell a parcel of land to the plaintiff because the plaintiff had not detrimentally relied on the promise. See also *Smith v. City and County of San Francisco*, 275 Cal. Rptr. 17, 23 (Cal. Ct. App. 1990) (arguing that property owners did not detrimentally rely on city's alleged promise "to act favorably on" proposed development plans); *Kurokawa v. Blum*, 245 Cal. Rptr. 463, 471 (Cal. Ct. App. 1988) (ruling that plaintiff failed to prove any reliance on partner's alleged promise of financial support); *Silver v. Mohasco Corp.*, 462 N.Y.S.2d 917, 920 (N.Y. App. Div. 1983) (finding that employee did not suffer "substantial and concrete injury" from employer's breach of alleged promise regarding disclosure of employee's termination), *aff'd*, 465 N.E.2d 361 (N.Y. 1984).

⁶⁵ *Edward Joy Co. v. Noise Control Prods., Inc.*, 443 N.Y.S.2d 361, 362 (N.Y. Sup. Ct. 1981).

⁶⁶ For additional evidence, see *Pham*, *supra* note 60, at 1271 (reporting that state courts granted relief in only 28 promissory estoppel cases between 1981 and 1992).

⁶⁷ GILMORE, *supra* note 1, at 63.

⁶⁸ See *Speidel*, *supra* note 5, at 1177-81.

⁶⁹ See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 688-89 (1984) (arguing that courts sometimes limit recoveries in contract cases to reliance, and give expectancy recoveries in promissory estoppel cases); see also Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

proportionate to those potentially contemplated in situations where the promisor is not somehow responsible for the losses.⁷⁰ In the typical case granting an excuse, for example, the promisor's costs of performance have been about twice what the parties expected.⁷¹ Short of this, courts do not give relief.

Finally, parties *can* limit judicial intervention on excuse grounds by careful planning and drafting. In fact, parties typically plan and draft their agreements successfully and perform them without a hitch, or at least without litigation.⁷² An allegation that judicial regulation through the excuse doctrines *subsumes* contract law therefore ignores contract practice.⁷³

III. REASONS FOR THE TRIUMPH OF *The Death of Contract*

If Gilmore's thesis was imprecise, embellished, or worse, what accounts for the book's success and popularity? *The Death of Contract* succeeds because it includes more significant and accurate insights and ideas than its critics were willing to admit. Perhaps more important, the book is memorable for its rhetorical power.

A. Insights

1. *The big picture.*—*The Death of Contract's* whole is greater than the sum of its parts.⁷⁴ Although Gilmore's description of each stage of contract law's development and demise may have been inaccurate, incomplete, or exaggerated, Gilmore successfully perceived and portrayed a larger, important, *and* accurate theme: Contract law evolved from a broad to a narrow to a broad conception in response to social, economic, and legal forces.⁷⁵ This progression symbolizes legal change in general, which continues unabated, notwithstanding the legal community's efforts to tame the law in casebooks, treatises, and restatements: "The materials are . . . forever changing—they dis-

⁷⁰ Hillman, *Cessation*, *supra* note 53, at 652.

⁷¹ *Id.*

⁷² See generally SUMMERS & HILLMAN, *supra* note 4, at 342-60 (setting forth planning and drafting strategies). Litigation costs and the potential loss of good will also contribute, of course.

⁷³ But contract may be "dead" in another sense: because of the "waning of . . . contract decisions of courts as a significant factor in American commercial life." Gordon, *supra* note 5, at 1219. For an elaboration of the theme that Gilmore failed to consider the death of contract from the "behaviorist" point of view, see *id.*

⁷⁴ "THE DEATH OF CONTRACT . . . offers a marvelously readable, impressionistic picture of the first hundred years of American contract law." Anthony J. Waters, Book Review, 36 MD. L. REV. 270, 286 (1976) [hereinafter Waters, Book Review]; see also Danzig, *supra* note 2, at 1127 (legal writing often consists of "piecemeal" analyses).

⁷⁵ Professor Waters pointed out that the bargain theory may have preceded, as well as succeeded, the nineteenth-century benefit or detriment approach. Waters, Book Review, *supra* note 73, at 283. This is, of course, additional evidence of the cyclical nature of contract law.

solve and recombine and metamorphose into their own opposites, all, it seems, without a moment's notice."⁷⁶

Gilmore saw that legal change was not chaotic, however, but consisted of "alternating rhythms" brought about by psychological, social, and economic forces reacting to the dominant legal regime.⁷⁷ He predicted recurring periods of narrow formalism and flexible realism in law corresponding to general periods of "dull" classicism and "exciting" romanticism in literature and the arts.⁷⁸ Observing that the process of dismantling classical contract law was complete, he prophesied the rise of a new formalism complete with the narrowing of legal liability. Several developments bear out his prediction. Consider again the striking failure of recent promissory estoppel claims. A movement is also afoot to scale back the scope of products liability law, which was one of Gilmore's central examples of tort's absorption of contract. In addition, California courts have beaten back the drive to create a full-fledged cause of action for tortious breach of contract, another Gilmore example of tort's ascendancy.⁷⁹

Gilmore's account helps explain the success in the recent past of movements such as law and economics. At least in part as a counterweight to the experimentation and improvisation of legal schools such as Critical Legal Studies, some economic analysts of law claimed that, when viewed through the economic lens, contract law proves to be largely objective, determinate, and divorced from political concerns.⁸⁰ Such a view appealed to a legal community primed to stem the tide of the "romantic" revolution.

2. *A potpourri of additional insights.*—Gilmore was a leading teacher, an eminent scholar, and an accomplished drafter of the Uniform Commercial Code.⁸¹ It should be no surprise that people were interested in reading what he had to say. They were not disappointed. In addition to supplying the big picture, Gilmore served up a feast of other ideas. For example, Gilmore anticipated some of the objections to the burgeoning law and economics movement, writing that laissez-

⁷⁶ GILMORE, *supra* note 1, at 2; *see also id.* at 107: "We are steeped in the idea that law is process, flux, change; our relativism admits no absolutes."

⁷⁷ *Id.* at 112.

⁷⁸ Although the reviewers were impatient for more, Gilmore spent considerable time explaining his view of law's relation to society. For example, according to Gilmore, "[l]aw, by its nature, reflects what is—not, except to the extent dictated by the idea of cultural lag, what was and never what will be." *Id.* at 10.

⁷⁹ *See* Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises From the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483 (1994).

⁸⁰ *See, e.g.,* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 428 (1990); *see also* Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 16 nn.55-56 (1991).

⁸¹ *See* Danzig, *supra* note 2, at 1125-26.

faire economics "work[s] ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act . . . as their own self-insurers."⁸²

Gilmore's discourse on the origins, roles, and effects of the Restatements is especially pertinent today, a period in which the American Law Institute's ambition to restate the law increasingly seems boundless. Gilmore observed that the first Restatement can be seen as a counterattack against the antiformalist thrusts of the legal realists.⁸³ Ironically, the first *Restatement of Contracts* ultimately may have supported the realists. The end product was not orderly and scientific, but "schizophrenic" because of the difference in philosophies of its principal, Williston, and his disciple, Corbin, and because of conflicts in the cases it was to reflect. Gilmore wrote that "[t]he unresolved tensions of the First Restatement . . . may . . . have largely contributed . . . to the emergence of . . . a radically new way of analyzing the problem of civil obligation."⁸⁴ Gilmore envisioned the rise of "contorts," comprised of the working principles of contracts and torts.⁸⁵ The main goal of the *Restatement (Second) of Contracts* was less ambitious according to Gilmore: to reflect the "policy of the legislative reforms" such as in the Uniform Commercial Code.⁸⁶

Gilmore expounded on a variety of other subjects. All are interesting and instructive. Among them are the American habit of reporting every case⁸⁷ and the wisdom of spending one's legal career preparing a legal treatise (both, according to Gilmore, are unwise).⁸⁸

B. Rhetorical Power

The Death of Contract contains powerful rhetoric. Most reviewers saw this and commented on its "erudition, wit, and style."⁸⁹ But remarks about the book's style and wit usually constituted only a brief detour before taking on Gilmore's historical account. The prose deserves a more focused look.

The Death of Contract is brief and succinct, and therefore accessible. It is also enjoyable to read. It is full of charming metaphors and poetic aphorisms. It is humorous. It transforms the mundane into high drama, and it is provocative.

⁸² GILMORE, *supra* note 1, at 104.

⁸³ *Id.* at 64-66; *see supra* notes 8-9 and accompanying text.

⁸⁴ GILMORE, *supra* note 1, at 110.

⁸⁵ *Id.* at 98.

⁸⁶ *Id.* at 76.

⁸⁷ *Id.* at 61.

⁸⁸ *Id.* at 64.

⁸⁹ Speidel, *supra* note 5, at 1161; *see also* Arthur T. von Mehren, Book Review, 75 COLUM. L. REV. 1404, 1404 (1975); Waters, Book Review, *supra* note 74, at 270 (calling it a "beautifully written story about law").

1. *Accessibility*.—As Gilmore himself said, “[a] lecturer, out of sympathy for his audience, naturally tries to make his statement as simple and uncomplicated as possible. He avoids qualifications, refinements, and collateral developments”⁹⁰ *The Death of Contract* is basically a transcript of four lectures given by Gilmore at the Ohio State University College of Law in 1970.⁹¹ As such, it retains these characteristics of a good lecture.

But does an effective lecture succeed as a book? The message of the critics was mixed at best. Most appreciated the book’s accessibility, but bemoaned Gilmore’s failure to follow through on many of his themes.⁹² Thus, Gilmore’s strategy ensured a wide readership,⁹³ but it also guaranteed some of the criticism that followed. At least in retrospect, much of the criticism, although accurate, seems unfair in the sense that it faulted Gilmore for failing to write a book that he had no intention of, but was certainly capable of, writing.⁹⁴

2. *Colorful Prose*.—The text of *The Death of Contract* is beautifully written. Gilmore is never drab; he is a master of the simile and the metaphor. The “Restatement and anti-Restatement” contradiction in Restatement Sections 75 and 90 are like the “matter and anti-matter” of the universe.⁹⁵ Contract law not only dies, it drowns,⁹⁶ catches a “fatal disease,”⁹⁷ and “decay[s] and disintegrat[es].”⁹⁸ Its body, or what is left of it, is “reabsorbed”⁹⁹ or “swallowed up.”¹⁰⁰

Gilmore’s penchant for hyperbole is also on display. Contract theory, among other things, is “absurd,”¹⁰¹ “newfangled,”¹⁰² “monstrous,”¹⁰³ and “moonshine and nonsense.”¹⁰⁴ It is no surprise that

⁹⁰ GILMORE, *supra* note 1, at xxxi.

⁹¹ *Id.* Gilmore modestly acknowledged that the footnotes only “occasionally . . . put a little flesh on the bones” of the text. *Id.* at xxxii.

⁹² Richard Danzig pointed out that the book contained “big, bright, bold generalizations already packaged in the style of the most vibrant classroom conversations.” Danzig, *supra* note 2, at 1130. Nevertheless, “central propositions are greatly simplified, hyperbole abounds, and the range of variables discussed is severely constricted.” *Id.*; see also Gary L. Milhollin, *More on the Death of Contract*, 24 CATH. U. L. REV. 29, 30 (1974) (Gilmore’s study cannot prove anything “because of its brevity”).

⁹³ See Danzig, *supra* note 2, at 1133 (“[T]he book’s simplicity has enhanced rather than inhibited its reception.”).

⁹⁴ Waters, Book Review, *supra* note 74, at 271 makes a similar point.

⁹⁵ GILMORE, *supra* note 1, at 68.

⁹⁶ “The dykes which were set up to protect the enclave have . . . been crumbling at a progressively rapid rate.” *Id.* at 96.

⁹⁷ *Id.* at 103.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 95.

¹⁰⁰ *Id.* at 79.

¹⁰¹ *Id.* at 19, 107.

¹⁰² *Id.* at 24.

¹⁰³ *Id.* at 19.

Gilmore believed that law students “should be dispensed from the accomplishment of antiquarian exercises in and about the theory of consideration.”¹⁰⁵

Gilmore colorfully brings his protagonists to life: “Langdell, like his namesake four centuries earlier, set sail over uncharted seas and inadvertently discovered a New World.”¹⁰⁶ “Holmes, like any revolutionary, merely sought to sugar over his more startling heresies with a frosting of antique learning.”¹⁰⁷ Holmes and Williston are “artisans of the great theory,”¹⁰⁸ whose work sent the legal community “off to the races at a dizzying clip.”¹⁰⁹ Cardozo was a “master of judicial ambiguity” who gave “cryptic hints . . . for our delectation and bewilderment.”¹¹⁰ He “delighted in weaving gossamer spider webs of consideration.”¹¹¹

3. *Humor*.—Gilmore successfully transferred the humor in his lectures to the pages of his book. *The Death of Contract* is enjoyable to read because Gilmore does not take himself too seriously, and many of his assertions are clearly made tongue in cheek. For example, Gilmore compares Christopher Columbus Langdell’s discovery of contract to Christopher Columbus’s discovery of America:

Western civilization had done very nicely for several millennia without anyone knowing that two undiscovered continents were interposed between Europe and Asia. It may be that we would all be better off if the first Columbus, as the result of a series of absurd miscalculations, had not revealed the truth. In somewhat the same way the common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts. Once its existence had been pointed out, however, it was no more possible for the legal mind to do without it than it would have been for the inhabitants of Western Europe to have exorcised from their collective imagination the troubling dream of the Americas.¹¹²

Gilmore especially enjoyed poking fun at academic lawyers: “[T]he academic mind is usually a generation or so behind the judicial mind in catching on” to legal developments.¹¹³ He saw the “dis- ingenuity” of using commercial law rules in noncommercial contexts.¹¹⁴ He was “completely uninterested” in empirical or

¹⁰⁴ *Id.* at 65.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 123 n.36.

¹⁰⁸ *Id.* at 52.

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 63.

¹¹¹ *Id.* at 69.

¹¹² *Id.* at 5.

¹¹³ *Id.* at 99.

¹¹⁴ *Id.* at 9.

sociological legal scholarship, believing it meaningless.¹¹⁵ Even judges were not immune from his bite: "That judicial ignorance is one of the great motivating forces of law reform has, of course, long been an open secret."¹¹⁶ When judges used the word estoppel it was "simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for plaintiff."¹¹⁷

But Gilmore was most fond of picking on Langdell. Langdell was a "great man" only because of the length of his life.¹¹⁸ Langdell had no distinction "whatever either of mind or . . . of style."¹¹⁹ Gilmore also wrote of Langdell's undeserved certitude,¹²⁰ and the "brain-washing" of his students.¹²¹ There are also humorous asides about Justice Story's sculptor son,¹²² "King Lear and his unruly daughters,"¹²³ and the mystery of Section 90.¹²⁴

4. *Drama*.—Gilmore manages to transform a book about the development of contract law into a fascinating story full of intrigue and conspiracy, heroes and villains, and revolution and stasis. It involves an ill-fated, illegitimate birth and an untimely, but well-deserved death.¹²⁵ Further, the conspirators, although occupying high places, are not always very adept or even intelligent. Gilmore therefore treats them with some contempt. Sarcasm drips from many lines.

The best example of Gilmore's flair for the dramatic, of course, is the wonderful title of the book. This is not just a book about contract law, so the title tells us, it involves the extinction of one of the core subjects of our civil law. When Gilmore reaffirms that "Contract, like God, is dead" in the opening sentences of the book, the reader is firmly caught up in the drama.¹²⁶

Gilmore's penchant for the dramatic is not confined to the title and opening pages, however. With theatrical flair, Gilmore sets forth his goal in the book: to speculate on why Langdell's discovery "had the fabulous success it did instead of going down the drain into obliv-

¹¹⁵ *Id.* at 1. Gordon responds to this thrust. Gordon, *supra* note 5.

¹¹⁶ GILMORE, *supra* note 1, at 63.

¹¹⁷ *Id.* at 71.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.*

¹²¹ *Id.* 14-15.

¹²² *Id.* at 12. William Wetmore Story wrote the first treatise on Sales, and "after that act of filial piety abandoned the law and spent the rest of a long life as a sculptor in Italy." *Id.* Gilmore concluded that "[t]he treatise on Sales is . . . very fine indeed and so, for all I know, the sculptures are too." *Id.*

¹²³ *Id.* at 9.

¹²⁴ "[N]o one had any idea what the damn thing meant." *Id.* at 71. For an interesting discussion of humor in legal writing, see, J.T. Knight, *Humor and the Law*, 1993 WIS. L. REV. 897.

¹²⁵ See especially GILMORE, *supra* note 1, at 75-76, 110.

¹²⁶ *Id.* at 1.

ion as a hundred better ideas than Langdell's do every day of the week."¹²⁷ Gilmore's answer was the existence of a "revolutionary" conspiracy.¹²⁸ Moreover, the conspirators "devious[ly]" interpreted the cases to support the theory, leading to "distortion" in presentation of the law.¹²⁹ For example, Williston misleadingly portrayed the objective approach to contract interpretation "as one of the great accomplishments of recent times—the apprehension of a fundamental truth which had long been hidden in a deep morass of error."¹³⁰ Judges daring to support the Holmes-Williston construct helped create "one of the least creditable episodes in our legal history."¹³¹ Diversity in case law was "successfully concealed" by the courts by ignoring counter-principles.¹³² The theory builders were Eastern parochials who ignored cases arising "in such remote, out-of-the-way places as Ohio and Wisconsin and North Dakota" to maintain "the appearance of unity."¹³³

IV. CONCLUSION

This discussion suggests that Gilmore's account of the rise and fall of contract, though flawed, deepens the reader's understanding of contract law and stimulates reflection. Perhaps even more than the inherent quality of its historical and legal arguments, however, the book's style contributed to its success and popularity.

This raises the question of the normative merits of rhetorical power. Should we be alarmed that rhetoric plays such a crucial role in the success of a book and the acceptance of its ideas? The role of rhetoric in contract jurisprudence is a subject recently invigorated by Richard Posner's interesting study of Cardozo.¹³⁴ Posner asserts that the power of Cardozo's rhetoric, more than the substance of his opinions, explains his ranking as a great judge. Posner adds, however, that the value of rhetoric in the law is controversial.¹³⁵

The value of rhetoric is controversial because it can facilitate the communication of either valuable or bankrupt ideas. Moreover, vivid examples and apt metaphors can increase clarity by setting forth and emphasizing particular models of reality,¹³⁶ but vague or complex

¹²⁷ *Id.* at 15.

¹²⁸ *Id.* at 22-23, 122-23 n.36; *see also id.* at 75-76.

¹²⁹ *Id.* at 30.

¹³⁰ *Id.* at 48.

¹³¹ *Id.* at 36 (applying the illusory promise principle to the mutuality of obligation requirement).

¹³² *Id.* at 62.

¹³³ *Id.*

¹³⁴ RICHARD A. POSNER, *CARDOZO, A STUDY IN REPUTATION* (1990).

¹³⁵ *Id.* at ix-x.

¹³⁶ Burr Henly, "Penumbra": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 81 (1987).

metaphors can "distort and confuse,"¹³⁷ distract from other aspects of a concept,¹³⁸ or even substitute for substantive reasoning.¹³⁹ Creative use of language can also liberate the author from overly rigid explication,¹⁴⁰ but blustery aphorisms and misleading allegories can camouflage the need for precision and clarity.¹⁴¹

Substance and style are, of course, intimately related.¹⁴² Language can change the way we perceive and understand information. Conversely, the power of a notion reflects on the language conveying it. For example, language communicating a morally corrupt idea may appear sinister and gratuitous instead of charming and interesting.

These observations raise interesting issues, worthy of further study as they apply to legal writing.¹⁴³ For now, I close with only a few thoughts on how they apply to *The Death of Contract*. Although the book should not necessarily mollify anyone concerned about the potential misuse of rhetorical power, it should not cause additional apprehension. As I have shown, the book is more than style; it contains a powerful set of messages. Moreover, the rhetoric does not get in the way; the artfulness of Gilmore's writing surely contributed to the communication of his theme. Likewise, the value of his ideas enhanced the reader's appreciation of the rhetoric.

¹³⁷ Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1651-52 (1993); Richard D. Rieke, *The Rhetoric of Law, A Bibliographical Essay*, 18 NO. 4 TODAY'S SPEECH 48, 48 (1970) (book review).

¹³⁸ Robert K.L. Collins, *Legal Metaphors Shape Our Vision of the Law*, NAT'L L.J., May 23, 1994, at A20 (citing GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980)).

¹³⁹ The danger is that "the vivid fictions and metaphors of traditional jurisprudence" will be "thought of as reasons for decisions, rather than poetical or mnemonic devices" thereby making one "forget the social forces which mold the law." Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1162-63 (1989) (quoting Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935)).

¹⁴⁰ David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214-15 (1991) (book review).

¹⁴¹ "The subtlety that makes metaphor the poet's boon can be the lawyer's bane. . . ." *Id.*

¹⁴² See, e.g., Richard H. Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With An Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 50 (1982); Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 309 (1979).

¹⁴³ I make such an effort in a forthcoming article. See Robert A. Hillman, *"Instinct with an Obligation" and the "Normative Ambiguity of Rhetorical Power"*, 56 OHIO STATE L.J. (forthcoming Oct. 1995); see also sources cited therein.